

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

HOUSTON POWELL,

Plaintiff,

vs.

GREGORY SMITH, et al.,

Defendants.

3:10-cv-619-ECR (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants' Motion to Dismiss. (Doc. #26.)¹ Plaintiff has opposed (Doc. #29) and Defendants have replied (Doc. #30). After a thorough review, the court recommends that the motion be granted without prejudice.

I. BACKGROUND

At all relevant times, Plaintiff Houston Powell (Plaintiff) was in custody of the Nevada Department of Corrections (NDOC) as an inmate at Nevada State Prison (NSP). (Pl.'s Sec. Am. Compl. 3 (Doc. #11).) Plaintiff brings this action pursuant to 42 U.S.C. § 1983. Defendants are NDOC and various NDOC officials, administrators, and employees. (*Id.* at 3-6.)

Plaintiff alleges that he was verbally assaulted by another inmate, Raymond Bynum, at NSP on October 2, 2008. (Doc. #11 at ¶¶ 20-21.) According to Plaintiff, as a result of this incident, inmate Bynum was escorted from the unit to the infirmary for a mental health

¹ Refers to court's docket number.

1 evaluation. (*Id.* at ¶¶ 22-27.) Approximately forty minutes later, inmate Bynum walked back
2 into the unit and went to Plaintiff's cell and physically attacked Plaintiff. (*Id.* at ¶¶ 28-33.)
3 Correctional officers arrived to pull inmate Bynum off of Plaintiff, and he suffered additional
4 injuries. (*Id.* at ¶¶ 34-35.) Plaintiff was transferred to the infirmary for treatment. (*Id.* at ¶¶
5 37-38.) After being treated, Plaintiff was handcuffed and escorted one-quarter mile away to
6 a disciplinary unit where he was placed on 24-hour lock down. (*Id.* at ¶¶ 39.) Plaintiff alleges
7 that in lock down he began experiencing extreme pain and discomfort from his injuries, but his
8 requests for medical care were refused or ignored. (*Id.* at ¶¶ 40-42.) Plaintiff alleges that it
9 took months to have x-rays taken, and he continued to experience severe pain and modified
10 mobility. (*Id.* at ¶¶ 43-50.)

11 Plaintiff asserts various causes of action related to Defendants' handling of inmate
12 Bynum, the treatment of his injuries, as well as state law claims for negligence and negligent
13 training and supervision of prison employees, and assault and battery. (Doc. # 11.)

14 Defendants move to dismiss because Plaintiff has failed to exhaust the available
15 administrative remedies. (Defs.' Mot. to Dismiss (Doc. #26).)

16 **II. LEGAL STANDARD**

17 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought
18 with respect to prison conditions under section 1983 of this title, or any other Federal law, by
19 a prisoner confined in any jail, prison, or other correctional facility until such administrative
20 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). An inmate must exhaust his
21 administrative remedies irrespective of the forms of relief sought and offered through
22 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001). The Supreme Court
23 recently clarified that exhaustion cannot be satisfied by filing an untimely or otherwise
24 procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion." *Woodford*
25 *v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the agency holds
26 out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* (quoting
27 *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

1 This court has interpreted Justice Alito's majority opinion in *Woodford* as setting forth
2 two tests for "proper exhaustion": (1) the "merits test," satisfied when a plaintiff's grievance is
3 fully addressed on the merits by the administrative agency and appealed through all the
4 agency's levels, and (2) the "compliance test," satisfied when a plaintiff complies with all critical
5 procedural rules and deadlines. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1134 (D. Nev. 2006).
6 "A finding that a plaintiff has met either test is sufficient for a finding of 'proper exhaustion'.
7 Defendants must show that Plaintiff failed to meet both the merits and compliance tests to
8 succeed in a motion to dismiss for failure to exhaust administrative remedies." *Id.*

9 The failure to exhaust administrative remedies is treated as a matter in abatement and
10 is properly raised in an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108,
11 1119 (9th Cir.2003), *cert. denied*, 540 U.S. 810 (2003). Failure to exhaust administrative
12 remedies is an affirmative defense, and defendants bear the burden of raising and proving
13 failure to exhaust. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt*, 315 F.3d at 1119. A court,
14 in deciding a motion to dismiss based on exhaustion, may look beyond the pleadings and decide
15 disputed issues of fact without converting the motion into one for summary judgment. *Id.*
16 (citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir.
17 1988) (per curiam)). If a court concludes that the prisoner bringing a suit has failed to exhaust
18 nonjudicial remedies, "the proper remedy is dismissal of the claim without prejudice." *Id.* at
19 1120.

20 For prisoners within the NDOC system, exhaustion of administrative remedies requires
21 complying with the Inmate Grievance Procedure set forth in NDOC Administrative Regulation
22 740 (AR 740). (Doc. # 26 at 3, Ex. A.) The administrative process consists of: (1) an informal
23 level grievance that is reviewed and responded to by an inmate caseworker; (2) a first level
24 formal written grievance appealing the informal grievance decision to the warden at the
25 institution where incident being grieved occurred; and (3) a second level grievance appealing
26 the first level grievance decision. (AR 740.02.1.1.1 (Doc. # 26 at 14).) If an inmate disagrees
27 with the response to any grievance, he may appeal the grievance to the next available level
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1 within the prescribed deadlines. (AR 740.02.1.1.1.4 (Doc. # 26 at 15).) Inmates may use the
2 grievance process to resolve claims including, personal property, property damage, disciplinary
3 appeals, personal injuries, and any other tort claim or civil rights claim relating to conditions
4 of institutional life. (AR 740.02.1.2.1 (Doc. # 26 at 15).) For claims involving personal property
5 damage or loss, personal injury, medical claims or other tort claims, including civil rights
6 claims, the inmate shall file an informal grievance within six calendar months. (AR
7 740.02.1.4.1.1 (Doc. # 26 at 17).) Failure to submit a proper informal grievance form within the
8 prescribed time frame shall constitute abandonment of the inmate's right to pursue resolution
9 of that claim at any level of inmate grievance procedure. (AR 740.02.1.4.1.2 (Doc. # 26 at 17).)

10 **III. DISCUSSION**

11 Defendants argue that Plaintiff has failed to exhaust his administrative remedies with
12 respect to any claim asserted in the Second Amended Complaint. (Doc. # 26 at 3- 6, Ex. B.)
13 Defendants submit the declaration of Silvia Garcia, Administrative Aide II to the Associate
14 Warden of Programs at NSP, who conducted a search for grievances that may have been filed
15 by Plaintiff between January 2008 and February 14, 2011, and a search of NDOC's Nevada
16 Offender Tracking Information System (NOTIS) where all inmate grievances are electronically
17 stored. (Doc. # 26 Ex. B at ¶ 6.) The search revealed that Plaintiff did not file any grievances
18 during this time. (Doc. # 26 Ex. B at ¶ 6, Attachment 1, ¶ 7.)

19 Plaintiff does not dispute that he failed to exhaust his administrative remedies. (Doc.
20 # 29 at 2.) Instead, Plaintiff argues: (A) the court should "find [§ 1997e] to be burdensome and
21 futile given the specific facts of this case"; (2) the language of AR 740 is unconstitutionally
22 vague; and (3) in the event the court determines Plaintiff failed to exhaust his administrative
23 remedies, the court should "allow him to remove this complaint and the state law claims to
24 State court." (*Id.* at 2-5.)

25 **A. Exhaustion Requirement**

26 Plaintiff's request that the court disregard § 1997e because it is "burdensome and futile"
27 is not well taken. The PLRA is unquestionably clear: an inmate may not file suit in federal
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1 court until he exhausts all available administrative remedies. 42 U.S.C. § 1997e(a). Exhaustion
2 is *mandatory*. See *Booth v. Churner*, 532 U.S. 731, 739, 741 (2001). *Booth* confirms that
3 “Congress meant to require procedural exhaustion regardless of the fit between a prisoner’s
4 prayer for relief and the administrative remedies possible. *Id.* at 739. “[S]aying that a party
5 may not sue in federal court *until* the party first *pursues* all available avenues of administrative
6 review necessarily means that, if the party never pursues all available avenues of administrative
7 review, the person will never be able to sue in federal court.” *Woodford v. Ngo*, 548 U.S. 81,
8 100 (2006) (emphasis in original).

9 Nevertheless, Plaintiff maintains that it is unreasonable to require filing a grievance for
10 an event that already occurred, and which could not be retroactively prevented. (Doc. # 29 at
11 3.) This argument is also unavailing. While it may be true that Defendants cannot undo the
12 events of which Plaintiff complains, that is necessarily the case with many inmate grievances.
13 The Supreme Court has been instructive in this regard:

14 Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve
15 the quality of prisoner suits; to this purpose, Congress afforded corrections
16 officials time and opportunity to address complaints internally before allowing
17 the initiation of a federal case. In some instances, corrective action taken in
18 response to an inmate’s grievance might improve prison administration and
19 satisfy the inmate, thereby obviating the need for litigation. In other instances,
20 the internal review might ‘filter out some frivolous claims.’ And for cases
21 ultimately brought to court, adjudication could be facilitated by an
22 administrative record that clarifies the contours of the controversy.
23 *Porter v. Nussle*, 534 U.S. 516, 530 (2002) (internal citations omitted). “It seems unlikely that
24 Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the
25 need to exhaust to the pleader’s option.” *Id.* (citation omitted).

26 Plaintiff misapplies the Supreme Court’s opinion in *Woodford v. Ngo* to support his
27 argument. (Doc. # 29 at 3.) The take-away from *Woodford* is that “proper exhaustion of
28 administrative remedies is necessary.” *Woodford*, 548 U.S. at 83-84. The Supreme Court
emphasized:

[t]he benefits of exhaustion can be realized only if the prison grievance system
is given a fair opportunity to consider the grievance. The prison grievance system
will not have such an opportunity unless the grievant complies with the system’s
critical procedural rules. A prisoner who does not want to participate in the

1 prison grievance system will have little incentive to comply with the system's
2 procedural rules unless noncompliance carries a sanction...
3 *Id.* at 95. Therefore, Plaintiff was required to comply with the prison's grievance procedures
4 to achieve proper exhaustion under the PLRA. *See Jones v. Bock*, 549 U.S. 199, 218 (2007);
5 *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009). Plaintiff undeniably failed to do so.

6 Plaintiff's reliance on *Griffin v. Arpaio* is similarly misplaced. Plaintiff relies on the
7 Ninth Circuit's statement that "[t]he primary purpose of a grievance is to alert the prison to a
8 problem and facilitate its resolution, not to lay groundwork for litigation." *Griffin*, 557 F.3d
9 at 1120 (citation omitted). Plaintiff uses this statement out of context to reason that the
10 violations report put Defendants on notice of the incident, relieving Plaintiff of the obligation
11 to fully exhaust his claims. *Griffin* involved an inmate who had actually utilized the prison's
12 grievance procedure. *Griffin*, 557 F.3d at 1120. The Ninth Circuit found that while Griffin did
13 not have to allege the precise legal theory to be advanced, he still failed to properly exhaust
14 because he did not provide sufficient information *in his grievances* so that prison staff could
15 address and respond to the situation. *Id.* The Court was not addressing a situation where an
16 inmate wholly failed to utilize the grievance system, and surely did not hold that generally
17 putting defendants on notice of complaints satisfies the exhaustion requirement.

18 To the extent Plaintiff is asserting that the court should apply an exception to the
19 exhaustion requirement under these circumstances, the Ninth Circuit discussed possible
20 exceptions to the PLRA's exhaustion requirement in *Nunez v. Duncan*, 591 F.3d 1217 (9th Cir.
21 2010). These include: the unavailability of administrative procedures, obstruction of attempts
22 to exhaust, and preventing exhaustion by failing to follow grievance procedures. *Id.* (citation
23 omitted). None of these exceptions are applicable here. Plaintiff has not made any argument
24 that the grievance system was unavailable to him. He does not argue that NDOC officials
25 obstructed his attempts to exhaust. Nor does he assert that he was prevented from exhausting
26 because procedures for grievances were not followed. Plaintiff has simply not asserted that any
27 recognized exception to the exhaustion requirement applies.

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1 Finally, Plaintiff argues that he is somehow relieved of the duty to exhaust because
2 exhaustion is an affirmative defense to be proven by the defense. (Doc. # 29 at 2.) This
3 argument is ineffective. While Plaintiff is correct that exhaustion is an affirmative defense, and
4 it must be raised and proven by the defense, *Jones v. Bock*, 549 U.S. 199, 216 (2007),
5 Defendants have properly raised the affirmative defense by way of an unenumerated 12(b)(6)
6 motion, and have demonstrated that Plaintiff never filed a grievance while incarcerated by
7 NDOC. Plaintiff has produced no evidence to the contrary.

8 **B. AR 740**

9 Plaintiff argues that because he is a layperson, and not educated in legal jargon, he does
10 not understand the regulation governing inmate grievances. (Doc. # 29 at 3-4.) Plaintiff's
11 argument that AR 740 is unconstitutionally vague is unconvincing.

12 Generally, a regulation is void for vagueness "if it fails to give adequate notice to people
13 of ordinary intelligence concerning the conduct it proscribes or if it invites arbitrary and
14 discriminatory enforcement." *United States v. Doremus*, 888 F.2d 630, 634 (9th Cir. 1989)
15 (citation omitted).

16 Preliminarily, the court is doubtful that this administrative regulation can be declared
17 void for vagueness because AR 740 does not proscribe any conduct, and is not penal in nature.
18 *See Skilling v. United States*, --- U.S. ---, ---, 130 S.Ct. 2896, 2927-2928 (2010) (citation
19 omitted)(void for vagueness doctrine applied to penal statute); *see also Anderson v. Morrow*,
20 371 F.3d 1027, 1031 (9th Cir. 2004) (citations omitted) ("A statute is void for vagueness if it
21 fails to 'define the criminal offense with sufficient definiteness that ordinary people can
22 understand what conduct is prohibited and in a manner that does not encourage arbitrary or
23 discriminatory enforcement.'").

24 Plaintiff relies on *Silvar v. Eighth Judicial Dist. Court ex rel. County of Clark*, 122
25 Nev. 289, 293, 129 P.3d 682, 684-85 (Nev. 2006), to support his argument that AR 740 is
26 unconstitutionally vague. (Doc. # 29 at 3.) *Silvar* involved the application of the void for
27 vagueness doctrine to Clark County's prostitution loitering ordinance, and the Nevada Supreme
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1 Court pointed out that the doctrine focuses on the requirement that citizens be given notice of
2 prohibited conduct. *Id.* at 291, 293 (“Without adequate notice, citizens would be frustrated
3 in their attempts to conform their conduct to the contours of the statute.”). AR 740 does not
4 proscribe conduct, but provides inmates with detailed instructions on how to utilize the
5 prison’s grievance procedure.

6 Even if the court determined the void for vagueness doctrine was applicable, the court
7 concludes that AR 740 is not vague, and Plaintiff’s argument is without merit. AR 740.01.1.2.1,
8 governing grievance issues, provides:

9 Inmates may use the Inmate Grievance Procedure to resolve addressable inmate
10 claims including, but not limited to personal property, property damage,
11 disciplinary appeals, personal injuries, any other tort claim or civil rights claim
12 relating to conditions of institutional life.
13 The regulation gives adequate notice of the types of claims for which an inmate may file a
14 grievance. It has been this court’s experience in nearly fifteen years of handling inmate
15 litigation that inmate plaintiffs understand the meaning of this section of AR 740 with great
16 acuity. Plaintiff’s suggestion that a person of ordinary intelligence cannot understand the
17 meaning of “civil rights” or “conditions of institutional life” is unconvincing.

18 Plaintiff also argues that AR 740 fails to provide a remedy for his unique situation. (Doc.
19 # 29 at 3.) Specifically, he argues that he should be excused from the exhaustion requirement
20 because he is seeking monetary damages for an incident that already occurred, could not be
21 retroactively prevented, and was not likely to reoccur. This argument was explicitly rejected
22 by the Supreme Court in *Booth v. Churner*. *Booth v. Churner*, 532 U.S. 731, 741 (2001)
23 (“Congress has mandated exhaustion clearly enough, regardless of the relief offered through
24 administrative procedures.”). In addition, in *Porter v. Nussle*, 534 U.S. 516 (2002), the
25 Supreme Court squarely held that “§1997e(a)’s exhaustion requirement applies to all prisoners
26 seeking redress for prison circumstances or occurrences.” *Porter*, 534 U.S. at 520. The
27 Supreme Court rejected the “single occurrence, prevailing circumstance dichotomy” in *Porter*.
28 *Id.* at 531. “[T]he PLRA’s exhaustion requirement applies to all inmate suits about prison life,
whether they involve general circumstances or particular episodes, and whether they allege

excessive force or some other wrong.” *Id.* at 523 (citation omitted).

C. Request for Removal

Finally, as to Plaintiff’s request that the court “allow him to remove his complaint to state court,” it appears Plaintiff may be confused about the removal procedure. 28 U.S.C. § 1441, *et. seq.*, governs the removal of an action. A defendant may remove an action brought in state court over which the United States District Court has original jurisdiction to federal court. 28 U.S.C. § 1441(a). Only defendants may remove a case, and removal is only accomplished from state to federal court. The removal process is not applicable here because Plaintiff initiated this action in federal court.

Instead of removal, it appears Plaintiff intended to ask the court to dismiss the federal claims and remand the state law claims to the state court.² The court is recommending dismissal of all claims without prejudice as a result of Plaintiff’s failure to exhaust his administrative remedies. The litigation strategy Plaintiff devises after dismissal is entirely within Plaintiff’s purview. Therefore, the court should dismiss Plaintiff’s claims, leaving it up to Plaintiff to determine whether he can permissibly re-file any of his claims in federal court, or alternatively, in state court.

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an Order **GRANTING** Defendants’ Motion to Dismiss (Doc. #26) without prejudice.

DATED: June 16, 2011.



UNITED STATES MAGISTRATE JUDGE

² Plaintiff relies on a Nevada case, *Richardson Const., Inc. v. Clark County School Dist.*, 123 Nev. 61, 156 P.3d 21 (Nev. 2007), which simply mentions in a footnote that the United States District Court declined to adjudicate and remanded the plaintiff’s state law claims. *See Richardson*, 123 Nev. 61, 156 P.3d at n.3.

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